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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No.

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GARY LEE CARLSON and
BRENT EARL CARLSON, Petitioners

v.

IRENE E. CARLSON, Respondent.

---

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

The petitioners, Gary Lee Carlson and Brent Earl Carlson respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above case on May 13, 1974.

## Opinions Below

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, is reported at 110 Cal. Reporter 154 (Oct. 1, 1973), which confirmed summary judgment for defendants entered by the Honorable

Judge Edwin F. Beach of the Ventura County Superior Court, Oxnard Branch, on June 20, 1972. The opinion of the Supreme Court of the State of California is reported in 113 Cal. Reporter 722 (May 13, 1974) and appears in the appendix hereto.

## Jurisdiction

The judgment of the Supreme Court of the State of California was entered May 13, 1974. A timely petition for rehearing was denied June 12, 1974, a timely petition in the alternative for delay in issuance of remittitur was denied by issuance of remittitur on June 13, 1974, and this petition for certiorari was filed within 90 days of the date of denial of petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

## Questions Presented

1. Does a spouse have a right to one-half the proceeds of a Federal Employees' Group Life Insurance policy purchased by an employee of the federal government under EGLI, with the insured directing that his two sons receive said insurance proceeds after his death, where community funds were used for payment of premiums for coverage under said policy?

## Statutory Provisions Involved

Although 5 U.S.C. §8701-8716 are all indirectly involved, 5 U.S.C. §8705(a)

is directly involved, and is quoted as follows:

> "(a) The amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title as provided by section 8706(b) or (c) of this title, in the Civil Service Commission. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
>
> Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.
>
> Fourth, if none of the above, to the parents of the employee or the survivor of them.

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of the employee.

Sixth, if none of the above, to other next of kin of the employee entitled under the laws of the domicile of the employee at the date of his death."

Statement of the Case

Irene E. Carlson and Carl G. Carlson were married in 1949 and lived together almost continuously until his death in July 1971. Although a petition for dissolution of marriage had been filed some months prior to death of decedent, the marriage was not terminated by legal proceedings. In 1954, The Metropolitan Life Insurance Company issued a group civil service life insurance policy to Carl G. Carlson under the Federal Employees' Group Life Insurance program (EGLI) and decedent became insured thereunder by reason of his employment for the federal government. All premiums were paid from community funds. Irene E. Carlson was named as beneficiary on said policy until June of 1971. In June of 1971 the insured changed beneficiary and named defendants Gary Lee Carlson and Brent Earl Carlson in place of Irene E. Carlson. No consideration was given to Irene E. Carlson at the time of change of beneficiary, and the change was made without her direct knowledge or consent.

Irene E. Carlson brought this

action after decedent's death to recover one-half of his $24,000 coverage as her community interest. The sons and Metropolitan were named as defendants. Metropolitan paid the proceeds into court and was dismissed from the action. Defendants' motion for summary judgment was granted, affirmed by the California Court of Appeals and reversed by the California Supreme Court. The $12,000 in dispute is, pursuant to stipulation, in a savings account accruing interest and will so remain pending disposition by this Court.

Reasons for Granting Writ

1. THE DECISION OF THE CALIFORNIA SUPREME COURT, REVERSING THE SUPERIOR AND APPELLATE COURTS, IS NOT IN ACCORD WITH THE WORDS AND MEANING OF FEDERAL STATUTE 5 U.S.C. 8701-8716, PARTICULARLY 5 U.S.C. §8705(a), EXCLUDING COMMUNITY PROPERTY RIGHTS.

The statute, particularly in the first three paragraphs of §8705(a) fully quoted above, plainly states that the named beneficiary is first in order of preference. Then the proceeds are to be paid to the "widow or widower of the employee..." "if there is no designated beneficiary". The words of the statute are clear, excluding any community property rights. The California Supreme Court is in error by saying the said order of preference does not show a clear unequivocal congressional mandate for pre-emption.

2. THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN CONFLICT WITH THE FEDERAL SUPREME COURT IN THE CASE OF WISSNER v. WISSNER, 338 U.S. 655, EXCLUDING COMMUNITY PROPERTY RIGHTS.

The California Superior Court and California Court of Appeals both said the present case was not distinquishable from the Wissner case where National Service Life Insurance (NSLI) was involved. The California Supreme Court has pointed to the following differences which it says are ones of substance, but really ones of form:

1. Congress does not have the same concern in protecting federal employees as it does servicemen.

2. NSLI limits beneficiaries to a widow, widower, child, parent, brother or sister of insured while EGLI presents no such limitation.

3. The federal government is the insurer in NSLI, while it is the procuring agent in EGLI.

4. NSLI provides for waiver of premium upon total disability, while EGLI leaves this up to the insurance carrier.

5. NSLI says no person shall have a vested right to an installment, and this does not appear in EGLI.

6. A restriction of policies from contests was made in NSLI, but not EGLI.

7. NSLI provided for forfeiture of rights for mutiny etc., but not in EGLI.

All these differences are of form

and merely point to the civilian, rather than the military, character of EGLI benefits. California has held that this very legislation (EGLI) is not distinguishable from Wissner, and that federal law excludes community property rights under it. Estate of Mahorney (1963) 214 C.A. 2d 334, and Thoen v. Thoen (1967) 248 Cal. App. 354. Also the Supremacy Clause of the Federal Constitution is controlling here Free v. Bland (1962) 369 U. S. 663.

## Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of Supreme Court of the State of California.

Respectfully submitted,

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July 19, 1974

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

| | | |
|---|---|---|
| IRENE E. CARLSON,<br>Plaintiff and Appellant,<br>v.<br>GARY LEE CARLSON et al,<br>Defendants and Respondents. | ) | L.A.<br>30222<br>(Super.<br>Ct.<br>2367X) |

Plaintiff appeals from an order of the Superior Court of Ventura County granting a motion by defendants Gary Lee Carlson and Brent Earl Carlson for summary judgment.

Facts: Plaintiff and Carl G. Carlson (decedent) were married in 1949 and lived together almost continuously until his death in July 1971. In 1954, defendant Metropolitan Life Insurance Company (Metropolitan) issued a group civil service life insurance policy under the Federal Employees' Group Life Insurance program (EGLI)[1]; and decedent became insured thereunder by reason of his employment by the United States Government at the Naval Missile Center, Point Mugu, California. During the marriage, both parties worked, and all premiums were paid from community property earnings. At the time

[1] 5 U.S.C. §§8701-8716.

decedent became insured under the policy, he named plaintiff as beneficiary; but in June 1971 he changed the beneficiary, designating in place of plaintiff his sons, defendants Gary Lee Carlson and Brent Earl Carlson. No consideration was given to plaintiff at the time of the change of beneficiary, and the change was made without her knowledge or consent.

Decedent's coverage under the policy was in the amount of $24,000; and after his death plaintiff brought this action, seeking to recover one-half the proceeds as her community interest therein. She named as defendants Metropolitan and the sons. Metropolitan paid the proceeds into court and was dismissed from the action. Thereafter, the trial court granted the motion of defendant sons for summary judgment, and this appeal followed.[2/]

Question: Where community property funds were used for payment of the premiums for coverage under a life insurance policy purchased by an employee of the federal government under EGLI, does the spouse have a right to one-half the proceeds payable after the insured's death?

Yes. Defendants recognize that if state law controls to the exclusion of

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[2/] Since defendant Metropolitan has been dismissed from the action, all references hereinafter made to "defendants" will be to defendant sons.

federal law, plaintiff is entitled to one-half the proceeds of the insurance here involved, since admittedly all the premiums were paid with community property funds. (Sieroty v. Silver, 58 Cal. 2d 799, 803; Grimm v. Grimm, 26 Cal. 2d 173, 175 [1].) Relying upon Wissner v. Wissner, 338 U. S. 655, however, defendants contend that Congress has spoken with force and clarity in allowing a decedent to select the beneficiary of insurance issued to him under the EGLI program and that such congressional mandate cannot be frustrated by California's community property laws.

But Wissner did not involve the EGLI program. Rather, it dealt with a policy issued under the National Service Life Insurance Program (NSLI) for members of the armed services [3]; and there are important differences in the programs, convincing this court that Congress has not spoken with force and clarity in the respect urged and that, accordingly, the principles laid down in Wissner are inapplicable here.

To begin with, Congress obviously intended a special policy for servicemen. The NSLI program was first adopted in 1940 at the commencement of World War II to provide low cost life insurance to those who might go to war in the service of their country. It was considered to be in the national interest to protect the serviceman's choice of beneficiary,

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[3] 38 U.S.C. §§ 701-724 (formerly §§801-823).

particularly in view of the phenonenon of changes in marital circumstances during periods of prolonged separation necessitated by military policy.

In Wissner, the record shows that the serviceman and his wife were estranged at or shortly after the time he entered the service; that he sought a divorce from his wife; and that, without his wife's knowledge or consent, he designated his parents as beneficiaries under the policy. Soon thereafter, while serving in India, he died. Under such facts, it was held that the congressional intent that the serviceman's designated beneficiaries should receive the entire proceeds, state law notwithstanding, was controlling.[4/]

With respect to the EGLI program, there is no overriding national interest such as that found to exist with regard to the NSLI program. Under EGLI, the government, in offering the group life insurance plan, acts as any other general employer would. Congress has provided an opportunity for federal employees to receive a basic life insurance plan at group rates, which plan does not differ materially from private employees' group life insurance plans. The sacrifices associated with military service, and especially long-term,

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[4/] As will hereinafter appear, the NSLI program limits permissible beneficiaries to a widow, widower, child, parent, brother, or sister of the insured; but the beneficiaries designated by the insured in Wissner fell within the prescribed class.

remote assignments with inherent risks, is not found in ordinary civil service employment. As a result, there is no basis for Congress's having the same concern to protect civil service employees as it has in protecting servicemen.

Under the NSLI program, Congress has, as pointed out in Wissner, clearly emphasized an intent to limit death benefits to the designated beneficiary; but a similar intent was not expressed in the EGLI legislation. Thus, the NSLI program specifically provides that the insured "shall have the right to designate the beneficiary or beneficiaries . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries ..." (38 U.S.C. §717.) No such specific designation is found in the EGLI program. There, the statutory language merely allows that the order of precedence would be "[f[irst, to the beneficiary or beneficiaries designated by the employee...." (5 U.S.C. §8705.) While such language permits the insured to designate a beneficiary, it is not unlike that found in all insurance policies and does not show the clear, unequivocal congressional mandate required for preemption.

Likewise, the NSLI program limits permissible beneficiaries to a "widow, widower, child, parent, brother or sister of the insured" (38 U.S.C. §716, subd. (b)); but no such restriction is found in the EGLI program. Accordingly, under the NSLI program, Congress has emphasized a desire to protect servicemen by prohibiting spurious beneficiaries; but employees

under the EGLI program are free to designate any beneficiary of their choice, thus further demonstrating the close relationship between that program and similar private employees' group life insurance plans.

Additionally, and of paramount importance, the government is the insurer in the NSLI program, necessitating public appropriations to finance any deficit of death payments (38 U.S.C. §719), while qualified private insurance companies (such as Metropolitan) serve as insurers under the EGLI program (5 U.S.C. §8709), requiring accurate actuarial data to project rates sufficient to cover the costs of administration and death benefits and to generate a profit. The government, in procuring insurance on behalf of its employees from private insurance carriers under EGLI, acts not as an insurer, but as the procuring agent. (See Brinson v. Brinson, 334 Fed. 2d 155, 158.)

Furthermore, as pointed out in Wissner, the NSLI program is a low cost program, while under the EGLI program employees contribute 66-2/3 percent "consistent with the lowest schedule of basic premium rates generally charged for new group life insurance policies issued to large employers" (5 U.S.C. §§8707, 8711), the government supplementing the employees' contributions as part of their over-all compensation (5 U.S.C. §8708), as do many private employers.

It is also significant that whereas the NSLI program provides that the

government may waive payment of premiums upon application due to total disability (38 U.S.C. §712), no similar provision is found in the EGLI program. Any waiver of premium provisions under the latter program is thus apparently left to the particular insurance carrier.

Additionally, in the NSLI program Congress specified that no person could have a vested right to any installment, but no such anti-vesting provision is included in the EGLI program. Likewise, although in the NSLI program Congress specifically restricted the policies from all contests (38 U.S.C. §710), it made no such restriction in the EGLI program. And whereas under the NSLI program acts of mutiny, treason, spying, desertion, or conscientious objections will result in a forfeiture of all rights (38 U.S.C. §711), no such provision is found in the EGLI program.

The overriding national interest in affording protection to the serviceman in his service to the country, with a resultant enhancement of his morale, is aptly pointed out in Wissner, where the Supreme Court of the United States said: "Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a

legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end . . . However 'vested' her [the widow's] right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance." (Italics added; pp. 660-661 of 338 U.S.)

This Court in In re Marriage of Fithian, 10 Cal. 3d 592, recently held that the supremacy clause (art. VI, cl.2) of the United States Constitution does not forbid the characterization of military retirement pay as community property in accordance with established principles of California law, nor preclude division of the pay as such property, in marriage dissolution proceedings, to the extent that the serviceman was married while on active duty.

In Fithian, we said at pages 598-599: "[W]e are asked to measure the property involved herein against a five-part Wissner 'test' which purportedly determines whether Congress intended a federally created property right to be immune from community property characterization by the states. According to this asserted yardstick, federal benefits must be the separate property of the recipient if (1) they were intended to directly enhance morale; (2) they were intended to be paid from congressional appropriations; (3) their administration costs were intended to be borne by the United States; (4) premiums or contributions to the system were intended to be low; and (5) they were intended to afford as much material protection as

possible to the recipient. Although the federal military retirement pay system doubtless satisfies each of the asserted criteria, the source of these purported standards is a tortured reading of the Wissner opinion. No precise language in Wissner is quoted in the formulation of this 'test' of congressional intent; rather the standard is devised by paraphrasing a series of statements by the court taken out of context and artificially grouped together. Aside from the vacuous content of the asserted 'tests,' which are so broad as to embrace virtually all federally created benefit plans, Wissner makes plain that it is embarking on the task of specific statutory construction, and not setting forth general propositions by which to evaluate the goals of Congress in other legislative enactments."

It was concluded that in the legislative enactment involved in Fithian, that is, legislation pertaining to federal military retirement pay, there was no indication by Congress that treating the pay as community property would circumvent the congressional scheme. In the present case, there would be even less reason to hold that Congress has indicated with force and clarity that the benefits constitute the separate property of the insured.

It will be noted, incidentally, from the italicized portion of the quotation from Wissner hereinabove set forth, that the Supreme Court of the United States limited its ruling therein to

government insurance and indicated that it did not extent to nongovernmental insurance. As previously pointed out, the government is not the insurer under the EGLI program. That program is administered by private insurance companies, and liabilities thereunder would not ordinarily be dischargeable out of congressional appropriations. (See 5 U.S.C. §§8709-8712.)

The order is reversed.

McCOMB, J.

WE CONCUR:

WRIGHT, C.J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.
CLARK, J.

I hereby certify that on this 31st day of July, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid both to ROBERT B. MAXWELL and WILLIAM A. REPPY, Attorneys at Law, 326 South "A" Street, Oxnard, California, Counsel for Respondent, and to GERTRUDE D. CHERN, Attorney at Law, 117 East Cook Street, P. O. Box 667, Santa Maria, California, counsel who filed an amicus brief herein. I further certify that all parties required to be served have been served.

/s/

Milton Posnick
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Counsel for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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No. 74-49

---

GARY LEE CARLSON and
BRENT EARL CARLSON,

Petitioners

v.

IRENE E. CARLSON,

Respondent

---

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

---

WILLIAM A. REPPY, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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GARY LEE CARLSON and
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v.

IRENE E. CARLSON, Respondent

---

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

---

## Jurisdiction

Respondent agrees with petitioners that their petition for writ of certiorari was timely filed and that this court has federal question jurisdiction.

## Questions Presented

1. Did Congress, in providing for Employees' Group Life Insurance (EGLI) for federal civil service

employees, intend to strip an employee's spouse of her interest under state law in an EGLI policy, where the insured employee purchased the insurance with funds in which his spouse had an equal, vested ownership interest?

2. If Congress did so intend, was the EGLI policy at issue here so related to national defense efforts of the United States that Congress' war power overrides the otherwise applicable Fifth Amendment obligation to pay Mrs. Carlson just compensation for taking her half interest in the policy?

## The Record Below

This case was decided below on truncated procedural papers: a complaint by Mrs. Carlson asserting half ownership of the EGLI policy at issue here, a short affidavit by one of the petitioners seeking summary judgment, and Mrs. Carlson's declaration opposing summary judgment. The judgment in favor of Mrs. Carlson arises out of her first amended complaint. She alleged she was half owner of $24,000 that had accrued "through the use of the earnings of plaintiff and the said Carl G. Carlson [her husband], all of which were community property of the husband and wife." Clerk's Transcript 43 line 28–44 lines 1-2.[1] Petitioners conceded below that the $24,000 referred to by Mrs. Carlson in her complaint were the proceeds of an EGLI policy her husband had purchased, naming petitioners as beneficiaries. C.T. 51 lines 12-16.

In her declaration opposing summary judgment Mrs. Carlson stated: "During the period of the marriage both husband and the declarant were employed and all premiums [on the EGLI policy] were paid from the earnings of the parties." C.T. 57 lines 5-7.

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[1]The Clerk's Transcript is hereinafter cited as "C.T." A copy thereof has been lodged with this Court.

This critical fact appearing in the complaint and in Mrs. Carlson's declaration—the fact that premiums were paid with earnings of husband *and* wife—was never controverted by petitioners. Quite the contrary. In their brief in the California Court of Appeal for the Second District, petitioners stated (brief p. 4 lines 16-18): "all or substantially all of the premiums of said policy were paid with *earnings of the husband and wife* while residing together."[2] (Emphasis added.)

The California Court of Appeal held that "the premiums were paid entirely out of community earnings." 34 Cal.App. 3d at , 110 Cal.Rptr. at 155. The California Supreme Court held that "both parties worked, and all premiums were paid from community property earnings." 11 Cal.3d at 477, 113 Cal.Rptr. at 723, 521 P.2d at 1115.

In their petition for certiorari in this Court, petitioners state (at p. 4): "All premiums were paid from community funds." Thus, husband and wife each had an equal, vested half interest in the policy when it was purchased. Calif. Civil Code § 5105.

The relationship of the husband-insured to the military efforts of the United States is not at all developed in the record. The affidavit of petitioner Gary Lee Carlson states only that the husband-insured was "an employee of the Naval Missile Center, Point Mugu [California]." C.T. 50 line 20. It is also known that the husband was a civilian employee at Point Mugu, for he obtained his EGLI coverage through the United States Civil Service Commission. C.T. 50 line 12-13. As to what kind of work Mr. Carlson did at Point Mugu, the record is totally silent.

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[2]Earnings of spouses not living together as man and wife are the separate property of the recipient. Calif. Civ. Code § 5118. The quoted portion of petitioner's brief is in effect a stipulation that community earnings of either Mr. or Mrs. Carlson were used to purchase the policy.

The record also indicates that the $24,000 of insurance proceeds constituted the bulk of Mr. Carlson's estate. The affidavit of Gary Lee Carlson states that

> there [are] no assets in the estate of Carl G. Carlson approximating this said sum of $24,000. Further, there are no assets in the estate of said decedent whereby it could even be contended that plaintiff would have a $12,000 community interest, with $12,000 remaining to be the interests of defendants. . . ." [C.T. 51 lines 14-19.]

## Reasons for Denying Certiorari

### I. THE COURT BELOW CORRECTLY HELD THAT IN THE STATUTES CREATING E.G.L.I. CONGRESS DID NOT INTEND THAT AN INSURED, PURCHASING INSURANCE WITH FUNDS OWNED EQUALLY BY HIS SPOUSE, COULD DIVEST HIS WIDOW OF HER EQUAL OWNERSHIP OF THE POLICY BY DESIGNATING A THIRD PARTY AS BENEFICIARY.

Marital property rights of husband and wife—whether created by way of dower, curtesy, a nonbarrable intestate share, or community of property—are seldom a federal concern. There is no federal common law of marital property to protect a wife in the event rights given to her by state law are stripped away. See De Sylva v. Ballentine, 351 U.S. 570 (1956). For such reasons this Court presumes that an act of Congress is not intended to interfere with state control over the protection to be accorded a surviving widow. As stated in United States v. Yazell, 382 U.S. 341, 352 (1966):

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.

Thus Congress must have "spoken with force and clarity" on the very question of displacing state law of marital property before this Court will find the local law of widow's rights pre-empted by a United States statute. Wissner v. Wissner, 388 U.S. 655, 658 (1950). Divesting the wife of her community interest must appear to be "the deliberate purpose of Congress." *Id.* at 659.

Nothing remotely satisfying these stringent tests appears in the statutes establishing E G L I. The portion of 5 U.S.C. § 8705(a) relied on by petitioners appears at pages 3 and 4 of their petition for certiorari. It simply recognizes that there will be under an EGLI policy a "beneficiary or beneficiaries designated." The statute is completely silent as to what rights third parties may have in the proceeds once paid. Only if Congress had addressed itself to possible third-party rights in the proceeds could it be held that Congress had "spoken with force and clarity" in showing an intent to divest a wife of her equal ownership of a policy purchased with community funds (or, in noncommunity property states, purchased half with her earnings and half with her husband's). What is apparent in reading § 8075(a) is that Congress did not think or address itself to the problem of who ultimately will obtain EGLI proceeds where the insured has used money owned by a third party to purchase the policy.

The petitioners' argument, that Congress, in referring to a payee who need not be the wife thereby implicitly intends to cut off a widow's community property interest in favor of the payee, has been rejected again and again in situations not distinguishable from the case at bar. In Guerrero v. Guerrero, 18 Ariz.App. 400, 502 P.2d 1077 (1972), the estate of a deceased husband urged that federal social security disability payments received during marriage by the husband as a result of many years of labor and

FICA deductions were the husband's separate property because the Social Security Act provided for payment of social security benefits to the "individual" employee and did not say anything about the employee's wife. 42 U.S.C. §§ 301 et. seq. The contention was rejected.

In Chambers v. Chambers, 259 La. 246, 249 So.2d 896 (1971), a husband argued that a cause of action under FELA and funds obtained in settlement of his FELA suit were her own separate property, not community property, because the statute gave the cause of action to "the employee" and said nothing about his spouse. 45 U.S.C. § 51. The contention was rejected.

In Fithian v. Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974), the husband asserted his federal military retirement pay was his separate property because the Act of Congress gave the benefits to "an officer of the Navy" and did not mention his wife. 10 U.S.C. § 6323. In a careful opinion closely examining the *Wissner* case relied on here by petitioners, the California Supreme Court rejected this theory.

If petitioners' contentions before this Court are correct, then all of the above cases were wrongly decided, and every dollar paid out of the federal treasury to a married person will be exempt from a state's community property system, or any other state-law scheme providing protection to a widow or widower. Thus, the need to adhere to the force-and-clarity test of *Wissner* is very apparent.

*Wissner*, the one case where this Court found that Congress did speak with force and clarity in showing an intent that a widow should have no interest in funds arising under a federal statute, is no help to petitioners. In *Wissner* as in the present case, the widow sought to use the judicial process to claim her community property share of the proceeds. The National Service Life Insurance statutory scheme contained a specific provision—stressed by this Court—directed at third party claims (i.e., a claim by a person other than the insured or the named beneficiary). NSLI proceeds, Congress had provided,

> shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary. [38 U.S.C. § 45a, quoted in 338 U.S. at 659.]

This is strong language. *Nobody* is to harass the beneficiary. That includes wives. Petitioners point to nothing like such language in the E.G.L.I. statutory scheme.

In sum, the mere direction by Congress that a designated "beneficiary" should be paid E.G.L.I. proceeds no more shows an intent to divest a wife of her interest therein than does a statute calling for payment of federal salaries to "the employee" without mention of his or her spouse. Silence about rights of third parties is not the required expression of "force and clarity" by Congress.

## II. IF CONGRESS WERE TO EXPRESSLY STATE AN INTENT TO DIVEST WIDOWS OF THEIR INTERESTS IN E.G.L.I. PROCEEDS, THE STATUTE WOULD VIOLATE THE FIFTH AMENDMENT.

It is fundamental that the Court will when possible avoid construction of a statute that renders it unconstitutional. Assuming arguendo that petitioners' interpretation of E.G.L.I. is as reasonable as respondent's, it was properly rejected below, because as construed by petitioners the statute would be unconstitutional under the Fifth Amendment. Petitioners themselves state on page 4 of their petition for writ of certiorari: "All premiums were paid from community funds." It will be recalled that the record is unclear whether the premiums were paid out of the husband's earnings or the wife's earnings or a bit of both. In any event, the wife has a present, existing, equal, vested interest in post-1927 California community property, regardless of who earns it. California Civil Code § 5105;

United States v. Malcolm, 282 U.S. 792 (1931).

Thus, under the position taken by petitioners in the trial court, California Court of Appeal, California Supreme Court, and this court, Mrs. Carlson was an equal community property owner of the policy; but when her husband died, according to petitioners, the Act of Congress took from Mrs. Carlson $12,000—half the proceeds—and gave it to petitioners. This would violate the due process clause of the Fifth Amendment. In addition if, as petitioners must contend,[3] the taking of a widow's interest is authorized by Congress under its war and national defense powers to promote public security, the just compensation clause of the Fifth Amendment is also violated.

### A. *Congress' War and Defense Powers, Relied on in* Wissner *to Uphold the Taking of the Widow's Property Without Payment of Compensation, Are Inapplicable to the Instant Case Because the Record Shows No Connection Between Mr. Carlson's Employment and War or National Defense.*

In Wissner v. Wissner, 338 U.S. 655 (1950), on which petitioners rely, the husband enlisted in the Army in 1942 less than a year after Pearl Harbor, when World War II was threatening our survival as a nation. The husband promptly subscribed to a National Service Life Insurance (NSLI) policy. Id. at 657. He became a captain and then a major, and in 1944 was on duty overseas in India. Wissner v. Wissner, 89 Cal.App.2d 759, 761-762, 201 P.2d 837, 839 (1949). After marital difficulties with his wife, Major Wissner designated his mother his NSLI beneficiary. He died in India in 1945 in the service of the United States Army. His widow then claimed ownership of half the policy and its proceeds.

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[3]That they do in fact so contend is clear from their reliance on *Wissner*. See Petition for Certiorari, p. 6.

The California District Court of Appeal, highest state court to hear the case, affirmed judgment for the wife, holding (1) the policy was purchased with husband's army pay, which was community property; (2) the NSLI statutory scheme did not evince an intent to cut off a wife's community interest in NSLI insurance proceeds; (3) if the Act of Congress did intend to divest her of her half ownership of the policy and its proceeds, it was unconstitutional under the Fifth Amendment. The California District Court of Appeal held that Congress' power to provide a plan of life insurance for armed servicemen was

> subject to the limitations imposed by the . . . Fifth Amendment, providing that the Congress shall not deprive any person of life, liberty, or property without due process of law, nor take his property for public use without just compensation. [89 Cal.App.2d at 765, 201 P.2d at 841.]

> [I]n view of the Fifth Amendment, the Federal government had no power to provide, as it is contended it did . . . , that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments. . . . [*Id.* at 767, 201 P.2d at 843.]

> In United States v. Cohen Grocery Co., 255 U.S. 81 [41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045], it was said that a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth Amendment. . . . [*Id.* at 769, 201 P.2d at 844.]

This Court accepted the state court's decision that community property had been used to acquire the NSLI policy (338 U.S. at 657):

> Major Wissner's army pay, which was held to be community property under California law,[2] was source of the premiums paid on the policy.
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> [2]We assume the correctness of the lower court's statement of state law. See also French v. French, 17 Cal.2d 755, 112 P.2d 235 (1941). The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property. [338 U.S. at 657.]

On the second issue, the intent of Congress, this Court as noted above found a clear and forceful expression of intent by Congress that no third person, including an insured's widow, could make any claims on NSLI proceeds. The Court expressly recognized that this holding raised the Fifth Amendment issue also decided by the California Court of Appeal.

> We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; *and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States.* [338 U.S. at 656; emphasis added.]

The Court's resolution of the Fifth Amendment issue is as follows (338 U.S. at 660-661):

> The constitutionality of the congressional mandate above expounded [that the widow could claim no interest in NSLI proceeds] need not detain us long. Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the Congressional powers over national defense, and the means are adopted to the chosen end. The Act is valid.

Thus, this Court disagreed with the California Court of Appeal that a state of war does not alter the effect of the Fifth Amendment as a limitation on Congress' power to take property without paying compensation. (Mrs. Wissner received nothing in lieu of the money she owned that paid half the premiums on her husband's NSLI policy.) In view of the fact that the Fifth Amendment issue clearly posed was whether Congress had the power to take Mrs. Wissner's property without compensating her, the Court's reliance in the above quotation on Congressional war power and national defense power can only mean that the Court was invoking the established line of authority holding that in some instances during time of war a citizen must suffer a taking of his or her property by the military where such is necessary to prosecute the war and defend the nation. See United States v. Caltex, 344 U.S. 149 (1952), holding no compensation was owing where during World War II the Army destroyed port facilities in the Philippines (owned by Americans) so they would not fall into the hands of the Japanese. See also United States v. Pacific R. Co., 120 U.S. 227, 234 (1887); United States v. Russell, 13 Wall. 623, 627-268 (1871).

In *Wissner* the record showed that the insured was in active service of the United States Army serving overseas during World War II, during which service he was killed. Although the *Caltex* exception whereby the federal war power overrides the Fifth Amendment due process and just compensation clauses is a narrow one, cf. YMCA v. United States, 395 U.S. 85 (1969), Major Wissner's insurance was directly related to his Army service abroad in time of war. As this Court stated in *Wissner*, Congress could view the morale of our fighting forces as at issue. Certainly only this intimate connection between the Major's insurance and active wartime service in defense of the nation could support the *Wissner* holding that divesting the wife of her interest in the policy without any compensation to her did not violate the Fifth Amendment.

In the present case, however, the record shows no relation between Mr. Carlson's employment and Viet Nam war activities or other national defense activities. All we know is that Mr. Carlson was a civilian employee at the Navy facility at Point Mugu. It is submitted that the mere fact alone that Mr. Carlson was not in the armed services makes the nexus between his EGLI insurance and prosecution of the Viet Nam war so weak that the *Caltex* line of cases must be inapplicable. Thus Congress could not divest Mrs. Carlson of her half ownership of the EGLI policy, even for the purpose of improving her husband's morale while working at Point Mugu, without paying Mrs. Carlson just compensation.

### B. *Viewing* Wissner *as Purely a Supremacy Clause Case, It Still Is No Help to Petitioners Because of Their Stipulation That the EGLI Policy was Purchased With Community Property.*

Although this Court in *Wissner* stated that it accepted the lower court's determination that community property was used to acquire the NSLI policy at issue there and although this Court stated that the constitutional issue presented was a Fifth Amendment issue, on that

theory the *Wissner* result seems such a startling extension of *Caltex* that respondent must consider the possibility there is some other explanation for *Wissner*. The result is correct under a very different theory—that a portion of Major Wissner's pay was diverted directly from the Army's federal treasury to the repository of federal NSLI funds in order to pay the Major's premiums. Such funds, moving from one federal account to another and never even entering Major Wissner's control, were never exposed to state law. A California wife's community property rights never attached, and hence no property interest of Mrs. Wissner was taken from her when all of the proceeds were paid to the Major's mother. On this theory, this Court in fact reversed the holding of the California Court of Appeals that community property was used to purchase the Major's NSLI policy,[4] notwithstanding footnote 2 of the *Wissner* opinion where the Court accepts the finding below that community funds were used to buy the policy.

Such a reading of *Wissner* means that application of the Supremacy Clause, not the Fifth Amendment, was the sole constitutional issue. There seems little doubt that Congress has the power to earmark certain federal payments to be kept out of state law marital property systems. A wife has no vested right in future earnings of her husband. For example, California could of course abolish the community property system prospectively even as to spouses already married. See Maynard v. Hill, 125 U.S. 190 (1888).

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[4]See Free v. Bland, 269 U.S. 663, 670 (1962), where the Court said: "Our holding is supported by *Wissner v. Wissner*, 338 U.S. 655. There the Congress made clear its intent to allow a serviceman to select the beneficiary of *his own* government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law." (Emphasis added.)

Petitioners have not and cannot on the record they have developed assert this alternative interpretation of *Wissner* to escape from the unavailability to them in this case of Congress' war power. The record does not present a mere finding by the California courts that community property, not federally-diverted separate property, was used to purchase the EGLI policy, a finding this court could reverse as erroneous. On the contrary, petitioners have at all stages of this case stipulated and agreed with Mrs. Carlson's allegation that the EGLI policy was purchased with "earnings of the parties." (See pp. 2-3, supra.) We would stress again to the Court petitioners' own statement in the petition for certiorari (p. 4): "All premiums were paid from community funds." Not only that, but petitioners have not established that it was Mr. Carlson's wages that were used to buy the insurance. While Mrs. Carlson conceded below that the premiums "probably" were paid with the husband's earnings (Special Brief for Appellant in the Supreme Court of California, App. 2), so far as the record shows the premiums could have been paid with the wife's earnings. The record is inadequate as a basis for granting certiorari.

Finally, of course, the federal control over Mr. Carlson's salary was not nearly so complete as was federal control in *Wissner*. EGLI is run by private insurance companies, not the federal government. 5 U.S.C. § 8709. The key transfer of federal funds—during which, on the alternative explanation of *Wissner*, state law must not attach and vest rights in the wife—is not from one federal depository to another but from the United States to a private company, in the present case Metropolitan Life Insurance Co.

In the case at bar, the wife's rights in the policy did vest under state law, and the constitutional question presented arises under the Fifth Amendment due process and just compensation clauses, not simply the Supremacy Clause of the constitution.

## III. THE RECORD DOES NOT RAISE ANY ISSUES UNDER FREE v. BLAND OR YIATCHOS v. YIATCHOS.

In addition to *Wissner*, this court has decided two other cases involving a claimed clash between federal statutes and state community property law. In Free v. Bland, 369 U.S. 663 (1962) a Texas husband had invested community property (clearly half-owned by the wife, since state law had undeniably attached) in United States savings bonds which the husband had had issued in joint tenancy form, i.e. to Mr. *or* Mrs. Free. The wife died. The state supreme court held that under Texas community property law a joint tenancy designation by the husband, as community property manager, was unavailable as a device to take from the wife her testamentary power over half the community property. Since federal regulations made very clear that joint tenancy designations on United States savings bonds were to be respected by the states, this Court reversed.

*Free* did not involve any "taking" of property rights of the wife given her by state law. The Fifth Amendment is not even mentioned by the court in *Free*, nor could the wife's estate have raised a due process or just compensation question. That is so because in Texas a husband had, as manager, the power to give away community property if not done in fraud of wife. E.g., Givens v. Girard Life Ins. Co., 480 S.W.2d 421 (Tex. Civ. App. 1972), writ ref'd, n.r.e. For example, he could have insured his wife's life with community funds and named his children beneficiary, and, absent fraud, the wife's estate would have had no basis to object.

In addition, where a Texas husband uses a will substitute (such as life insurance or a joint tenancy bank account) to convey community property at death, Texas is an "aggregate theory" community property state. E.g., Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962). This means that at dissolution of the community by death of husband or wife, a spouse does not own an undivided half interest in each item of community property (such as

the bonds) but instead has claim to property in the aggregate roughly equal in value to half the community property.[5] Thus, the deceased Mrs. Free could have asserted testamentary control over items of community property sufficient to make up for the removal of the bonds from her testamentary power.

In *Free* the Texas Supreme Court violated the Supremacy Clause by refusing to accept a joint tenancy designation on federal bonds as one more means, along with life insurance and inter vivos gifts, by which a spouse in Texas is able to remove entire items of community property (and even more than half the community property) from the other spouse's testamentary control. This court's decision in *Free* took no vested property right away from Mrs. Free but merely required the federal procedure for diverting community property to be respected along with state procedures. This court itself recognized that the bonds could not be used as a device for the husband to defraud the wife. 369 U.S. at 670. Thus, the property right Texas had vested in Mrs. Free—to relief from fraudulent acts by her husband—was retained in the *Free* decision.

Two years later in Yiatchos v. Yiatchos, 376 U.S. 306, this Court made very clear its position that federal statutes will not in the ordinary case be permitted to operate as a vehicle for the taking without compensation of

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[5]In practice the aggregate theory in Texas has meant that a husband predeceasing his wife can at his death divert from his wife substantially more than half the community property, again provided no fraud on the wife, so long as she is well provided for. E.g., Kemp v. Metropolitan Life Insurance Co., 205 F.2d 857 (5th Cir. 1953) (value of what widow recieved was 42% of value of all community property). Thus, the aggregate theory is highly elastic in Texas and gives a manager-spouse (at present Texas has a sex-neutral managerial scheme) power to divert community property away from the other spouse.

state-law granted marital property rights. A Washington husband, Mr. Yiatchos, purchased United States savings bonds with community property and designated his brother to be owner of the bonds on the husband's death. The husband died survived by his wife. The Washington Supreme Court held that Mrs. Yiatchos was entitled to half the bonds, or otherwise she would be "divest[ed] . . . of any interest in her own property" 376 U.S. at 308, quoting from In re Yiatchos' Estate, 60 Wash.2d 179, 182, 373 P.2d 125, 127 (1962). Washington is an "item theory" community property state, giving the wife a property right at her husband's death in an undivided half interest in each item of community property (such as the bonds.)[6] This court recognized that because of the property rights vested in a wife under Washington law, the issue in *Yiatchos* went beyond a mere Supremacy Clause question and involved an attempted use by Mr. Yiatchos of the federal bond regulations to take his wife's porperty from her. This court held:

> In applying the federal standard [of whether there has been a fradulent taking of the wife's property] we shall be guided by state law insofar as the property interests of the widow created by state law are concerned. *It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law* and which would not be transferred by her husband but for the survivorship provisions of the federal bonds." [376 U.S. at 309.]

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[6]When this court decided *Yiatchos*, the precedent in Washington as to whether it was an item or aggregate theory state was hazy. Estate of Patton, 6 Wash. App. 464, 494 P.2d 238 (1972), made clear that Washington is in fact an item theory state.

The court also said that if, as the wife contended, Washington were an item theory state, "to allow all of the bonds to pass to the designated beneficiary would effect an involuntary and impermissible conversion of the widow's assets." *Id.* at 311.

Just the sort of taking without compensation that the *Yiatchos* court would not allow is involved in the present case. California is and clearly has been for years an item theory state. E.g., Dargie v. Patterson, 176 Cal. 174, 169 P. 360 (1917). The above quotation from *Yiatchos* that the Supremacy Clause does not permit a "conversion of the widow's assets" is equally applicable to our case. If their interpretation of the E.G.L.I. statutes is to be constitutional, petitioners must show that just compensation was given Mrs. Carlson for the taking—which they do not and cannot show—or that some overriding federal interest under Congress' war power dispenses with the need for just compensation, as in *Wissner*.

In *Yiatchos* two dissenting justices raised the question whether the federal bond regulations should be construed as commanding a state to apply the aggregate system to an estate where a deceased spouse had sought to pass the entire interest in bonds to a designated beneficiary other than the surviving spouse. (I.e., Mr. Yiatchos can name his brother sole surviving owner of the bonds but the widow then gets other community property equal in value.)

This theory has not been and cannot be asserted by petitioners in the case at bar. Not only did they never assert it below, but there simply is no statutory language concerning E.G.L.I. that could be the basis for such a claim. Moreover, the very record built by petitioner Gary Lee Carlson indicates that the aggregate theory probably could not provide petitioners the relief they seek. See Carlson's affidavit stating that nothing approaching the value of the $24,000 in insurance proceeds was present in the deceased husband's estate. (C.T. 51; see page 4, supra.) Mrs. Carlson would not be fully compensated for the taking unless assets equal in value to what she has lost are provided for her.

## CONCLUSION

In providing for E.G.L.I. Congress did not, as it did in the NSLI statutory scheme, make any provision to bar third-party claims on the proceeds. If this court considers petitioners' contrary interpretation also to be reasonable, the constitutionality of the statute must be considered. Can Congress' war power be used to take from Mrs. Carlson $12,000 without compensation? All we know in respect to this war power issue is that Mr. Carlson was a civil service employee at a Naval facility. He may have been involved in the Viet Nam war effort; he may have held some position totally unrelated to the war effort. It is submitted that this court, as a predicate to granting certiorari to decide whether to expand the Fifth Amendment holding of *Wissner*, needs a far clearer record showing the relationship of the E.G.L.I. insurance program and Mr. Carlson's own insurance policy in particular to war power activities of the United States.

Accordingly, respondent prays that certiorari be denied.

Respectfully submitted,

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